

**STATE OF MAINE
SUPREME JUDICIAL COURT
NOTICE AND OPPORTUNITY FOR COMMENT
ON**

**Proposed Amendments to the
Maine Rules of Criminal Procedure**

Comments Due on or Before Friday June 18, 2010

The Supreme Judicial Court is considering proposed amendments to many provisions of the Maine Rules of Criminal Procedure. The draft amendments follow this notice. The principal purposes of the proposed amendments are to: (1) adjust court appearance practices and rules terminology to the various practices for managing criminal dockets across the State including combined clerks offices, unified criminal dockets, and separate District Court and Superior Court clerks offices and locations; (2) adjust practice for appointment of counsel and related rules terminology to implement the impending changes in control over the designation, supervision and payment of court appointed counsel resulting from the establishment of the Maine Commission on Indigent Legal Services (4 M.R.S. §§ 1801-1805 and 5 M.R.S. §§ 959 and 12004-G (25-A), enacted by P.L. 2009, ch. 419; and (3) make minor or technical changes in a few rules, such as amending Rule 6 to permit presence of a security officer in the Grand Jury, when appropriate. The nature and purpose of the changes in each rule are addressed in the Advisory Note following that rule.

The Court invites comments on the proposed amendments. Any comments should be filed with the Clerk of the Supreme Judicial Court by **Friday June 18, 2010**. Comments in writing should be mailed to the address below. Comments sent via e-mail may be in the text of an e-mail or in an attachment to an e-mail, addressed to: lawcourt.clerk@maine.gov. If the comments are in an attachment, the attachment must be a document in one of the following formats: plain text (.txt); Microsoft Word 1997-2004 (.doc); rich text format (.rtf); or portable document format (.pdf). The Clerk's Office will acknowledge receipt of the e-mail via a reply e-mail.

All comments must contain (1) the name, mailing address, and telephone number of the individual submitting the comments; and (2) the name, mailing

address, and main telephone number of the organization (if any) on whose behalf the comments are submitted. An individual need not be an attorney to submit comments on behalf of an organization.

Dated: June 7, 2010.

Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101-4125
(207) 822-4146

DRAFT 06-07-10 DRAFT
STATE OF MAINE
SUPREME JUDICIAL COURT
****PROPOSED****
AMENDMENTS TO MAINE RULES OF CRIMINAL PROCEDURE

2010 Me. Rules --

Effective: July 1, 2010

All the justices concurring therein, the following amendments to the Maine Rules of Criminal Procedure are adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending each amendment, but is not part of the amendment adopted by the Court.

1. Rule 1 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 1. TITLE AND SCOPE OF RULES

(a) Title. These rules may be known and cited as the Maine Rules of Criminal Procedure.

(b) Scope. These rules govern the procedure in the Superior Court and the District Court:

(1) ~~*The Superior Court:*~~

~~(A)~~ In all criminal proceedings, including appellate and post-conviction review proceedings, extradition proceedings, proceedings and a proceeding on a post-conviction motion for DNA analysis, and proceedings on a post-judgment motion by a person whose identify allegedly has been stolen and falsely used; and

~~(B) — in a juvenile crime appellate proceeding; and~~

~~(2) — *The District Court:*~~

~~(A) in all criminal proceedings, including extradition proceedings and in a proceeding on a post-conviction motion for DNA analysis;~~

~~(B)(2)~~ In proceedings before justices of the peace and bail commissioners; and

~~(C)(3)~~ In juvenile crime proceedings (including appellate proceedings) to the extent consistent with the Maine Juvenile Code.

These rules are not applicable to forfeiture of property for a violation of a statute of the State of Maine or the collection of fines and penalties. These rules are not applicable to revocation proceedings under Title 17-A, sections 1205 through 1207, section 1233 or sections 1349-D through 1349-F except to the extent and under the conditions stated in those sections. These rules are not applicable to proceedings for administrative inspection warrants, traffic infractions, actions for license revocation or suspension, civil violations, search warrants for schedule Z drugs, and land use violations addressed in Rules 80E, 80F, 80G, 80H, 80I and 80K of the Maine Rules of Civil Procedure, except as those civil rules may reference or incorporate provisions of these rules.

(c) Procedure When None Specified. When no procedure is specifically prescribed the court shall proceed in any lawful manner not inconsistent with the Constitution of the United States or of the State of Maine, these rules or any applicable statutes.

(d) Forms. Forms no longer accompany these rules. ~~Forms are currently prepared by the Judicial Branch Forms Committee and, to a limited extent, by the Supreme Judicial Court. Forms are intended to be both sufficient under the rules and reflective of the simplicity and brevity of statement that the rules contemplate.~~ Forms are available through the courts and, ~~to an increasing extent, on the Internet~~ some forms that may be utilized by the public are available on the Maine Judicial Branch website.

(e) Effective Date of Amendments. Amendments to these rules will take effect on the day specified in the order adopting them. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when they take effect would not be feasible or would work injustice, in which event the former procedure applies.

Advisory Note—July 2010

M.R. Crim. P. 1. The amendment modifies subdivision (b) of Rule 1 in three respects. First, editing changes are made to eliminate duplicative language and the unnecessary distinctions between the Superior Court and the District Court. Those distinctions have been creating confusion and uncertainty in the many trial courts currently operating with combined Superior Court and District Court clerk's offices and the increasing number of courts operating with unified criminal dockets. As to the latter, see Administrative Order JB-08-2, *Establishment of the Cumberland County Unified Criminal Docket*, effective January 1, 2009, and Administrative Order JB-10-1, *Establishment of the Bangor Unified Criminal Docket*, effective January 4, 2010. These changes do not change statutory court authority in any way. For example, juvenile and extradition proceedings will continue to be heard as District Court matters; juvenile appeals will continue to be heard as Superior Court matters.

Second, the last paragraph of subdivision (b) is amended to eliminate another point of confusion by clarifying that the Maine Rules of Criminal Procedure do not govern proceedings for administrative inspection warrants, traffic infractions, actions for license revocation or suspension, civil violations, search warrants for schedule Z drugs, and land use violations addressed in Rules 80E, 80F, 80G, 80H, 80I and 80K of the Maine Rules of Civil Procedure, except as those civil rules may reference or incorporate provisions of these rules.

Third, a substantive change to subdivision (b) is necessitated by a recent statutory enactment. The amendment adds a reference to new Part XIII containing Rules 105-109, adopted by 2010 Me. Rules 5, effective March 31, 2010, addressing the new statutory post-judgment relief mechanism for persons whose identities have been stolen and falsely used by another person in a criminal

proceeding. *See* 15 M.R.S. §§ 2181-2184, enacted by P.L. 2009, ch. 287, § 1, effective September 12, 2009. *See also*, Advisory Note—March 2010 to M.R. Crim. P. Part XIII and Rules 105-109.

Finally, the amendment modifies subdivision (d) of Rule 1 to reduce unnecessary references to forms, deleting language added when forms ceased being published with the Maine Rules of Criminal Procedure more than a decade ago. *See* Me. Rptr., 746-754 A.2d CV and LXVII-LXVIII.

2. The heading of Rule 5 and subdivisions (a) and (d) of Rule 5 of the Maine Rules of Criminal Procedure are amended to read as follows:

**RULE 5. INITIAL PROCEEDINGS ~~IN THE DISTRICT COURT FOR~~
PERSONS ARRESTED OR SUMMONSED FOR CLASS D OR FOR CLASS
E CRIMES ONLY**

(a) **Initial Appearance Before the ~~District Court Judge~~ Court.** A person arrested for a Class D or Class E crime (and not charged with related Class C or higher crimes), ~~either~~ (i) under a warrant issued upon a complaint filed in the District Court or the Superior Court or (ii) without a warrant, who is not sooner released, shall be brought before a District Court judge or a Superior Court justice without unnecessary delay and in no event later than 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays. Such appearance may be by audiovisual device in the discretion of the court. If such appearance has not taken place within 36 hours after the arrest, the custodian shall notify the attorney for the state of the upcoming deadline. If such appearance has not taken place within 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays, the custodian shall release the person from custody or bring the person forthwith before the District Court or the Superior Court for such appearance.

(1) *Person Arrested Under a Warrant.* Persons arrested for a Class D or Class E crime (and not charged with related Class C or higher crimes) under a warrant issued upon a complaint ~~filed in the District Court~~ shall be taken before the ~~District Court~~ court designated in the warrant or the nearest available ~~District Court~~ court. If the arrest is made at a place 100 miles or more from the court designated in the warrant, the person arrested, if bail has not previously been set or denied by the court, shall be taken before the nearest available ~~District Court judge~~ court or bail commissioner, who shall admit the person to bail for appearance before the ~~District Court~~ court within which the complaint has been filed.

(2) *Persons Arrested Without a Warrant.* Persons arrested without a warrant for a Class D or Class E crimes only (and not charged with related Class C or higher crimes) shall be taken before the nearest available ~~District Court judge~~ court. The complaint shall be filed with the ~~District Court judge~~ court forthwith. A determination of probable cause shall be made in accordance with Rule 4A.

....

(d) Assignment of Counsel. When a person, who is charged with a Class D or Class E crime, is entitled to court ~~appointed~~ assigned counsel, the ~~District Court judge~~ court shall ~~appoint~~ assign counsel to represent the person, pursuant to Rule 44, not later than the time of the initial appearance, unless the person elects to proceed without counsel. Counsel may be ~~appointed~~ assigned, or a lawyer for the day may be designated, for the limited purpose of representing the person at initial appearance or arraignment.

Advisory Note—July 2010

The amendment modifies Rule 5 in three respects.

First, it eliminates the unnecessary distinction between the Superior Court and the District Court by making the rule applicable to initial proceedings occurring in either trial court for persons arrested or summonsed for misdemeanor crimes. *See also* Advisory Note—July 2010 to M.R. Crim. P. 1.

Second, it eliminates a point of confusion by clarifying that Rule 5 addresses initial proceedings for persons arrested or summonsed for Class D or Class E crimes only and not charged with a related Class C or higher crime. If the person is also arrested or summonsed for a related Class C or higher crime, the initial proceedings are as specified in Rule 5C rather than Rule 5.

Third, the amendment substitutes “assigned counsel” for “court-appointed counsel” and adds references to Rule 44 and “a lawyer for the day” in subdivision (d). The substitution and added reference to Rule 44 are in response to the recent statutory enactment establishing the Maine Commission on Indigent Legal Services. *See* Advisory Note—July 2010 to M.R. Crim. P. 44. The added reference to “a lawyer for the day” is for the purpose of completeness. The determination of indigency and the assignment and compensation of counsel is governed by the provisions of Rules 44, 44A, and 44B.

3. Rule 5B of the Maine Rules of Criminal Procedure is amended to read as follows:

**RULE 5B. TRANSFER FROM DISTRICT COURT TO SUPERIOR
COURT IF A CLASS C OR HIGHER CRIME IS ADDED BY ATTORNEY
FOR THE STATE**

In any proceeding initiated in the District Court pursuant to Rule 5, the accused shall appear before the District Court as directed. In the event that the attorney for the state elects to charge by amendment of the original complaint pursuant to Rule 8(a), or by filing a new complaint, a related charge of murder or a related charge involving at least one Class A, Class B or Class C crime, the District Court, upon appearance of the accused, shall make a determination of probable cause if required by Rule 4A, advise the accused of the original and the added charges, assure that the accused, or counsel, has a copy of the added charges and

provide the same initial statement and further statement required of a ~~Superior Court justice~~ the court pursuant to Rule 5C(b) and (c). Following the appearance, unless a plea of guilty is contemplated pursuant to Rule 11(f) and 17-A M.R.S.A. § 9(3), the District Court shall promptly transmit to the appropriate Superior Court the District Court's entire original file in the case, any bail that has been taken and a copy of all the docket entries. Bail shall continue until further order of the Superior Court. Pretrial motions will be heard and decided in Superior Court.

Advisory Note—July 2010

The amendment to M.R. Crim. P. 5B eliminates the reference to any specific court in the second sentence, as the appearance and statements addressed in Rule 5C(b) and (c) may be before either a District Court judge or a Superior Court justice.

4. Rule 5C of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 5C. INITIAL PROCEEDINGS IN THE SUPERIOR COURT FOR PERSONS ARRESTED OR SUMMONSED FOR A CLASS C OR HIGHER CRIME

(a) **Initial Appearance Before the ~~Superior Court~~ Court.** A person arrested for at least one Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) (i) under a warrant issued upon an indictment or upon an information or complaint filed in the District Court or the Superior Court or (ii) without a warrant, who is not sooner released, shall be brought before a District Court judge or a Superior Court justice without unnecessary delay and in no event later than 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays. Such appearance may be by audiovisual device in the discretion of the court. If such appearance has not taken place within 36 hours after the arrest, the custodian shall notify the attorney for the state of the upcoming

deadline. If such appearance has not taken place within 48 hours after the arrest, excluding Saturdays, Sundays, legal holidays, and court holidays, the custodian shall release the person from custody or bring the person forthwith before the District Court or the Superior Court for such appearance.

(1) *Persons Arrested Under a Warrant.* Persons arrested for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) under a warrant issued upon an indictment, an information, or a complaint ~~filed in the Superior Court~~ shall be taken before the ~~Superior Court~~ designated in the warrant or the nearest available ~~Superior Court~~. If the arrest is made at a place 100 miles or more from the court designated in the warrant, the person arrested, if bail has not ~~been~~ previously been set or denied by the court, shall be taken before the nearest available ~~Superior Court justice court~~ or bail commissioner, who shall admit the person to bail for appearance before the ~~Superior Court~~ within which the indictment, information, or complaint has been filed. A determination of probable cause pursuant to Rule 4A shall not be made.

(2) *Persons Arrested Without a Warrant.* Persons arrested without a warrant for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes) shall be taken before the nearest available ~~Superior Court~~. The complaint or information shall be filed with the ~~Superior Court justice court~~ forthwith. A determination of probable cause shall be made in accordance with Rule 4A unless an indictment has been returned.

(b) Initial Statement by the ~~Superior Court Justice Court~~. When a person arrested for at least one Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes), ~~either (i)~~ under a warrant issued upon an indictment, an information, or upon a complaint ~~filed in the Superior Court~~ or ~~(ii)~~ without a warrant, is brought before a ~~Superior Court justice court~~ or a person who has been summonsed appears before a ~~Superior Court justice~~

court in response to a summons, the District Court judge or Superior Court justice, in open court, shall, unless waived by the person or the person's counsel inform the person of:

- (1) ~~inform the person of~~ the substance of the charges against the person;
- (2) ~~inform the person of~~ the person's right to retain counsel, and to request the assignment of counsel, and that the person may be allowed a reasonable time and opportunity to consult counsel before entering a plea;
- (3) ~~inform the person~~ the right to remain silent and that the person is not required to make a statement and that any statement made by the person may be used against the person;
- (4) ~~admit the person to bail as provided by law; and~~
- (5) ~~inform the person of the duty placed upon on the person by 14 M.R.S.A. § 3141(3), if convicted of the charges against the person, to pay immediately and of immediate payment in full of any fine that ultimately be imposed by the court, if convicted of the charges against the person.~~

In the proceeding, the court shall also admit the person to bail as provided by law.

(c) Further Statement by the ~~Superior Court Justice~~ Court With Respect to Class C or Higher Crimes in the Absence of an Indictment or Information. A person charged by complaint with any Class C or higher crime shall not be called upon to plead to that Class C or higher crime, and the person shall be advised of the right to apply for a waiver of indictment and to enter any plea upon a complaint or an information after a waiver is accepted. No person charged with murder shall be allowed to plead guilty or nolo contendere prior to indictment.

(d) Further Statement and Arraignment by the Court with Respect to Class D or E Crimes. In addition to the statements in subsection (b) of this Rule,

when a person is charged with a Class D or Class E crime and no related Class C or higher crime, before calling upon a person to plead, the ~~Superior Court justice court~~ shall ~~inform the person of:~~ provide to the person the statement of rights required by Rule 5(b).

~~(1) the maximum penalties and any applicable mandatory minimum penalties; and~~

~~— (2) the person's right to trial by jury and of the necessity of a demand for jury trial in accordance with these rules. Unless a demand for trial by jury is filed not later than 21 days after arraignment, the defendant shall be deemed to have waived the right to trial by jury.~~

~~A person charged with a Class D or Class E crime and no related Class C or higher crime, shall be called upon to plead unless that person has requested a reasonable time and opportunity to consult with counsel.~~

(e) Assignment of Counsel. When a person is entitled to ~~court appointed~~ assigned counsel, the ~~Superior Court justice court~~ shall ~~appoint~~ assign counsel to represent the person, pursuant to Rule 44, for initial appearance, unless the person elects to proceed without counsel. Counsel may be ~~appointed~~ assigned, or an attorney for the day may be designated, for the limited purpose of representing the person at initial appearance or arraignment. The determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44, 44A, and 44B.

Subject to the limitation in subsection (c) of this Rule, a person who has been allowed a reasonable time and opportunity to consult with counsel shall be called upon to plead.

(f) ~~Retention of Jurisdiction.~~ When a person is arrested or summonsed for a Class C or higher crime and a first appearance ~~is schedule before the Superior Court~~ occurs in any court, the Superior Court or a court with a unified criminal

docket shall ~~retain~~ have jurisdiction over the Class C or higher charge and all related Class D and Class E charges even if the attorney for the state, at any time, elects to amend or dismiss the Class C or higher charge so that no Class C or higher charge remains pending.

Advisory Note—July 2010

The amendment modifies Rule 5C in six respects.

First, it eliminates the unnecessary distinction between the Superior Court and the District Court by making the rule applicable to initial proceedings occurring in either trial court for persons arrested or summonsed for at least one Class C or higher crime, accompanied or unaccompanied by related Class D or Class E crimes. *See also* Advisory Note—July 2010 to M.R. Crim. P. 1.

Second, it adds clarity to subdivision (a), paragraphs (1) and (2) and subdivision (b) by adding in the first sentence of each “for a Class C or higher crime (accompanied or unaccompanied by related Class D or Class E crimes).”

Third, the substance of Rule 5, subdivision (b) currently repeated in subdivision (d) is deleted in favor of simply directing that the court “provide to the person the further statement required by Rule 5(b).”

Fourth, the direction to admit the person to bail is moved from the list of rights the person is to be informed about to the end of subdivision (b) as a direction for action the court is to take in the proceeding.

Fifth, the same changes are made to subdivision (e) that are made to Rule 5, subdivision (d). *See* Advisory Note—July 2010 to M.R. Crim. P. 5.

Sixth, in subdivision (f) a reference is added to “a court with a unified criminal docket.”

5. Rule 6, subdivisions (d) and (e) of the Maine Rules of Criminal Procedure are amended to read as follows:

(d) Presence During Proceedings. While the grand jury is taking evidence, only the attorneys for the state, the witness under examination, and, when ordered by the court, a security officer, an interpreter, translator, court reporter, or operator of electronic recording equipment may be present. While the grand jury is deliberating or voting, only the jurors may be present.

(e) General Rule of Secrecy. A juror, attorney, security officer, interpreter, translator, court reporter, operator of electronic recording equipment, or any person to whom disclosure is made under this rule may not disclose matters occurring before the grand jury, except as otherwise provided in these rules or when so directed by the court. No obligation of secrecy may be imposed upon any person except in accordance with this rule. In the event an indictment is not returned, any stenographic notes and electronic backup, if any, of an official court reporter or tape or digital record of an electronic sound recording and any written record of information necessary for an accurate transcription prepared by the operator and any transcripts of such notes, tape or digital record shall be impounded by the court. The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, and in that event the court shall seal the indictment and no person may disclose the finding of the indictment except when necessary for the issuance or execution of a warrant or summons. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and any vote of any juror, may be made to:

(1) an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws;

(2) such staff members of an attorney for the state as are assigned to the attorney for the state and are reasonably necessary to assist an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws; and

(3) another state grand jury by an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws.

Any person to whom matters are disclosed under paragraphs (1) or (2) of subdivision (e) of this rule may not utilize that grand jury material for any purpose other than assisting the attorney for the state in the performance of such attorney's duty to enforce the state's criminal laws.

Advisory Note—July 2010

The amendment to M.R. Crim. P. 6(d) and (e) adds “security officer” to subdivision (d) to allow the court to order that a security officer be physically present while the grand jury is taking evidence when the court is satisfied that this action is appropriate to help ensure the safety of the grand jurors and the attorneys for the state. Additionally, the amendment expands the rule of secrecy in subdivision (e) to include a “security officer.”

6. Rule 17, subdivision (b), of the Maine Rules of Criminal Procedure is amended to read as follows:

(b) Indigent Defendants. A defendant determined indigent by the court pursuant to Rule 44(b) is entitled to subpoena an in-state witness without payment of the witness fee, mileage and cost of service of the subpoena. Such fees and costs shall be paid ~~out of Judicial Department funds by the Maine Commission on~~ Indigent Legal Services. A request to the sheriff for service shall be accompanied by a certificate of counsel that the defendant has been determined indigent.

A defendant who is financially unable to pay the fees and costs to subpoena an out-of-state witness may move ex parte for an order dispensing with payment of fees and costs. The court shall grant the motion if it finds the defendant is unable to pay the fees and costs and that the presence of the witness is necessary to an adequate defense.

Advisory Note—July 2010

M.R. Crim. P. 17(b). *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

7. Rule 23, subdivisions (b) and (c) of the Maine Rules of Criminal Procedure are amended to read as follows:

(b) Jury of ~~Less~~ Fewer Than 12. Juries shall be of 12, but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number ~~less~~ fewer than 12.

(c) Trial Without a Jury ~~in the Superior Court~~. In a case tried ~~in the Superior Court~~ without a jury the court shall make a general finding and shall in addition on request stated on the record after the court announces its verdict, find the facts specially on the record or in a written decision. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Advisory Note—July 2010

The amendment to M.R. Crim. P. 23(b) and (c) modifies both the heading and substance of subdivision (b) of Rule 23 by replacing the word “less” with the word “fewer.” Further, the amendment modifies subdivision (c) in two respects, reflective of current practice. First, it removes from both the heading and the substance of subdivision (c) the references to the “Superior Court,” thus broadening the rule to allow parties to request findings after announcement of a general verdict in non-jury trials in either the Superior Court or the District Court. Second, it requires that the party requesting further findings do so at the time the verdict is announced at the conclusion of the trial. The large volume of non-jury criminal trials makes delayed requests for findings impractical because of the risk of confusing different cases with similar issues.

When the court takes a matter under advisement to announce a verdict at a later time by written decision, if the written decision does not include findings, any request for findings must be filed promptly after publication of the written decision.

8. Rule 27 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 27. RECORDING OF PROCEEDINGS

(a) ~~In the Superior Court~~ **Proceedings Recorded.** All proceedings in the District Court or the Superior Court shall be electronically recorded or taken down by a court reporter.

(b) ~~In the District Court.~~ All arraignments, trials, and evidentiary hearings ~~on motions shall be recorded.~~

~~(e)~~ **Preservation of Record.** In all other respects, Rule 76H of the Maine Rules of Civil Procedure governs the procedure for electronic recording in criminal cases, except that all recordings and records pertaining to a criminal proceeding shall be retained until the expiration of any sentence that is longer than the retention period provided for such recordings and records in civil cases by civil Rule 76H(e).

~~(d)~~**(c) Expenses.** Upon appropriate motion, the court shall direct that the state bear any expense for listening to recordings by or preparation of a transcript for indigent defendants who qualify for the assignment of counsel pursuant to Rule 44.

Advisory Note—July 2010

The amendment modifies Rule 27 in two respects. First, it collapses subdivisions (a) and (b) into a single subdivision to reflect the current practice that all proceedings in criminal cases in both the Superior Court and the District Court are recorded. Second, it clarifies in subdivision (c) [formerly subdivision (d)] that only those defendants entitled to assignment of counsel, pursuant to Rule 44, may have the state bear the expense for listening to a recording or preparing a transcript of a proceeding.

9. Rule 36 subdivision (f) of the Maine Rules of Criminal Procedure is amended to read as follows:

(f) Further District Court Action. The District Court shall take no further action pending disposition of the appeal by the Superior Court except the ~~appointment~~ assignment of counsel for an indigent defendant, the granting of stay of execution and, when permitted by statute, the fixing or revocation of bail pending appeal. The determination of indigency and the assignment and compensation of counsel shall be governed by the provisions of Rules 44, 44A, and 44B.

Advisory Note—July 2010

M.R. Crim. P. 36(f). *See* Advisory Note—July 2010 for amendments to Rule 44.

10. Rule 41(e) of the Maine Rules of Criminal procedure is amended to read as follows:

(e) Motion for Return of Property. A person aggrieved by an unlawful seizure, when no charge has been filed, may move the Superior court in the county in which the property was seized for the return of the property on the ground that it was illegally seized.

A person aggrieved by an unlawful seizure related to a pending charge of a Class D or Class E crime brought in District Court may move ~~the District Court, while the District Court~~ in the court that has jurisdiction of the charge, for the return of the property on the ground that it was illegally seized.

The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the court shall order that the

property be restored unless otherwise subject to lawful detention. The motion may be joined with a motion to suppress evidence.

Advisory Note—July 2010

The amendment to M.R. Crim. P. 41(e) subdivision clarifies that a party may file a motion for return of seized property in that court in which a charge related to or arising from the seizure is pending. If no charge has been filed, the motion is to be brought in the Superior Court located in the county in which the property was seized.

11. Rule 44, subdivision (a), (b) and (c), of the Maine Rules of Criminal Procedure are amended to read as follows:

(a) Assignment of Counsel.

When a defendant or a petitioner in a proceeding governed by these rules is without sufficient means to employ counsel and is entitled by law to appointment or assignment of counsel at state expense, such appointment or assignment shall be governed by Rules 44, 44A and 44B.

(1) *Before Verdict.* If the defendant in a proceeding in which the crime charged is murder or a Class A, Class B, or Class C crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to be represented by counsel and assign counsel to represent the defendant at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel. Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Services will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court. Counsel initially assigned by the court shall remain counsel

of record unless the Commission does not accept the assignment and provides notice of substitution of counsel or counsel is otherwise granted leave to withdraw pursuant to Rule 44B. If a defendant in a proceeding in which the crime charge is a Class D or Class E crime appears without counsel, the court shall advise the defendant of the defendant's right to counsel and shall assign counsel to represent the defendant unless the defendant elects to proceed without counsel or has sufficient means to employ counsel or unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed.

If a defendant in a proceeding in which the crime charged is a Class D or Class E crime appears in any court without counsel, the court shall advise the defendant of the defendant's right to be represented by counsel at every stage of the proceeding unless the defendant elects to proceed without counsel. If the defendant is without sufficient means to employ counsel, the court shall make an initial assignment of counsel, unless the court concludes that in the event of conviction a sentence of imprisonment will not be imposed. Assigned counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned. The Maine Commission on Indigent Legal Services will, pursuant to procedures established by the Commission, accept the initial assignment made by the court or substitute other counsel for counsel assigned by the court. Counsel initially assigned by the court shall remain counsel of record unless the Commission does not accept the assignment and provides notice of substitution of counsel or counsel is otherwise granted leave to withdraw under Rule 44B.

(2) *On Appeal.* ~~Counsel a~~ Assigned counsel who represents a defendant in the District Court, or the Superior Court, or a court with a unified criminal docket shall continue to represent the defendant on appeal unless relieved by order of the trial or appellate court.

The court may assign counsel to a defendant determined indigent after verdict or finding pursuant to Rule 44A.

(b) Determination of Indigency. The court shall determine whether a defendant has sufficient means with which to employ counsel and in making such determination may examine the defendant under oath concerning the defendant's financial resources. A defendant does not have sufficient means with which to employ counsel if the defendant's lack of resources effectively prevents the defendant from retaining the services of competent counsel. In making its determination the court shall consider the following factors: the defendant's income, the defendant's credit standing, the availability and convertibility of any assets owned by the defendant, the living expenses of the defendant and the defendant's dependents, the defendant's outstanding obligations, the financial resources of the defendant's parents if the defendant is an unemancipated minor residing with his or her parents, and the cost of retaining the services of competent counsel.

If the court finds that the defendant has sufficient means with which to bear a portion of the expense of ~~the defendant's defense~~ representation, it shall ~~appoint~~ assign competent counsel to represent the defendant in accordance with subdivision (a)(1), above, but may condition its order on the defendant's paying to the court a specified portion of the counsel fees and costs of defense. When such a conditional order is issued the court shall ~~file a decree setting forth~~ enter an order stating its findings.

(c) Compensation of Counsel. Assigned counsel shall receive compensation for services performed and expenses incurred as assigned counsel pursuant to rates and standards established by the Maine Commission on Indigent Legal Services pursuant to 4 M.R.S. § 1804 (2), (3). ~~Counsel appointed to represent a defendant shall be afforded reasonable compensation for services and~~

~~for the costs of the defense. In fixing the amount of counsel fees the court shall consider the following factors: the professional responsibility of the Bar to assist the court in providing legal assistance to indigent defendants, the experience of appointed counsel, the difficulty of the case, the quality of the representation, the time counsel has expended, and the customary fees paid to privately retained counsel for the same or similar services. Appointed Assigned counsel shall under no circumstances accept from the defendant or from anyone else on the defendant's behalf any compensation for services or costs of defense, except pursuant to court order.~~

Advisory Note—July 2010

The amendments to M.R. Crim. P. 44(a), (b) and (c) make changes to subdivisions (a), (b) and (c) necessitated by the establishment of the Maine Commission on Indigent Legal Services (4 M.R.S. §§ 1801-1805 and 5 M.R.S. §§ 959 and 12004-G (25-A), enacted by P.L. 2009, ch. 419. These changes reflect a transfer of responsibility for indigent legal services from the Judicial Branch to the independent Commission. *See* Emergency Preamble to P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801 and 1804.

The statute implementing the Maine Commission on Indigent Legal Services explicitly references case types that fall under the Commission's purview, including criminal matters. *See* P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801, 1802, and 1804. The initial paragraph of Rule 44, added by this amendment, clarifies that Rule 44 applies to all cases in which the court is authorized by law to appoint or assign counsel to represent a party at state expense in proceedings governed by the Criminal Rules.

Addressing determination of indigency, which remains the responsibility of the court, subdivision (b) has three minor modifications. Specifically, the word “assign” is replaced by the word “appoint” because of the new statutory definition for “assigned counsel” (4 M.R.S. § 1802(1)); the word “competent” is deleted because attorneys designated by the Commission must be competent (4 M.R.S. §§ 1801 and 1804(2)(B) and (3)(E)); and a condition is added that the court's initial assignment be “in accordance with subdivision (a)(1).”

Subdivision (c) is substantially modified to reflect that the Commission rather than the Judicial Branch is now responsible for establishing rates of compensation for assigned counsel, including allowing reimbursement for expenses incurred by assigned counsel (4 M.R.S. § 1804(2)(F) and (3)(F)), and that the Commission rather than the Judicial Branch is now responsible for paying compensation and expenses to assigned counsel. (4 M.R.S. § 1804(3)).

If the court finds that a defendant has sufficient means with which to bear a portion of the expense of representation and conditions assignment of counsel upon payment to the court a specified portion of the counsel fees and costs of representation, the court will transfer funds collected to the Maine Commission on Indigent Legal Services after offset of court expenses incurred in collection.

In addition to the more significant amendments, the following changes have been made respecting subdivisions (a) and (c):

(1) Paragraph (1) of subdivision (a) has been broken up into two separate paragraphs to enhance clarity;

(2) A reference to “a court with a unified criminal docket” has been added to paragraph (2) of subdivision (a);

(3) The word “appointed” has been replaced with the word “assigned” in subdivision (c); and

(4) The current exception in subdivision (c) “except pursuant to court order” respecting the prohibition against assigned counsel accepting compensation for services or costs of defense from the defendant or anyone else on the defendant’s behalf, has been deleted.

12. Rule 44, subdivision (d), of the Maine Rules of Criminal Procedure is adopted read as follows:

(d) Counsel appointed or assigned by the Court prior to the publication of rosters by the Commission. Counsel appointed or assigned by the court prior to the publication of rosters containing the names of attorneys designated by the Commission as eligible to receive assignments and those

attorneys appointed or assigned prior to July 1, 2010, shall be deemed to be attorneys “designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case to which counsel is assigned” in accordance with subdivision (a)(2), above. Counsel will maintain this status for purpose of the cases assigned by the court unless and until the Commission assigns substitute counsel. The Commission shall be responsible for the for the compensation for services performed and expenses incurred by counsel appointed or assigned pursuant to this subdivision in accordance with subdivision (c) up to the time of substitution, withdrawal or completion of the case.

Advisory Note—July 2010

Rule 44(d) is a transition provision providing a procedural mechanism governing the shift of responsibility for assignment, designation and payment of counsel for indigent defendants during the transfer of responsibility for assigned counsel services from the Judicial Branch to the Maine Commission on Indigent Legal Services. It provides that those attorneys appointed or assigned by the court prior to the Commission’s assuming responsibility for assignment and designation of counsel would be deemed designated for assignment to the cases to which they have been assigned by the court until the Commission has the mechanisms in place to assume responsibility these functions.

13. Rule 44B of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 44B. WITHDRAWAL OF COUNSEL

Counsel may withdraw from a case by serving notice of withdrawal on his or her client and the state and filing the notice, provided that such notice is accompanied by notice of the appearance of other counsel. In a case where counsel is assigned to represent an indigent defendant, the other counsel must be designated by the Maine Commission on Indigent Legal Services as eligible to receive assignments for the type of case involved. Unless ~~this~~ these conditions is

are met, counsel may withdraw from the case only by leave of court. A court order relieving ~~appointed~~ assigned counsel does not become effective until either new counsel is ~~appointed~~ assigned in accordance with Rule 44, subdivision (a)(1), or the defendant formally waives the right to be represented by counsel.—~~Counsel appointed by the District Court shall continue to represent the defendant until appointment of counsel by the Superior Court.~~

Advisory Note—July 2010

The amendment to M.R. Crim. P. 44B modifies the Rule in five respects. First, a new condition for withdrawal of counsel assigned to represent an indigent defendant is added in the first sentence requiring that assigned replacement counsel “be designated by the Maine Commission on Indigent Legal Services to receive assignment for the type of case involved.” *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

Second, the word “appointed” in the second sentence is replaced by the word “assigned.” *Id.*

Third, in the same sentence assignment of new counsel must now be “in accordance with Rule 44, subdivision (a)(1).” *Id.*

Fourth, the phrase “be represented by counsel” has been added at the end of the second sentence for completeness.

Fifth, the final sentence of the Rule has been deleted as unnecessary.

14. Rule 44C of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 44C. PROCEDURE FOR OBTAINING FUNDS FOR EXPERT OR INVESTIGATIVE ASSISTANCE FOR INDIGENT DEFENDANT

(a) ~~Motion.~~ Application to the Maine Commission on Indigent Legal Services.

~~(1) *Who May File.* A defendant found indigent or who claims to be without sufficient means to employ expert or investigative assistance necessary for his or her defense may file a ~~motion~~ an application for funds to obtain expert or investigative assistance or both with the Maine Commission on Indigent Legal Services in accordance with procedures established by the Commission.~~

~~(2) *Grounds of Motion.* The motion shall state the reasons why the assistance is necessary for an adequate defense. It may be supported by affidavit.~~

~~(b) **Service of Motion.** Except as provided in subdivision (c), the motion shall be served upon the attorney for the state.~~

~~(c) **Ex Parte Motion.** An ex parte motion shall state with particularity the reasons why it should not be served on the attorney for the state. It shall be presented to the clerk, who shall present it to the court. It shall not be docketed unless so ordered by the court.~~

~~(d) **Judicial Determination of Whether to Proceed Ex Parte.** The Court shall determine whether the motion demonstrates good cause to proceed ex parte. If the court finds good cause, it shall then decide the merits of the motion, give the attorney for the state such notice of its order as it deems proper and order the appropriate docket entry. If the court does not find good cause to proceed ex parte, it shall order the motion docketed and served.~~

Advisory Note—July 2010

The amendment to M.R. Crim. P. 44C is necessitated by the establishment of the Maine Commission on Indigent Legal Services. *See* Advisory Note—July 2010 to M.R. Crim. P. 44. The changes reflect (subject to a necessary transition period) a transfer of responsibility from the Judicial Branch to the independent Commission for indigent legal services. *Id.*

In the context of obtaining funds for expert or investigative assistance by an indigent, Rule 44C is substantially modified to reflect that it is the Commission, rather than the Judicial Branch, that is now responsible both for paying for any

such funds and for establishing the procedures to be used by indigent defendants for obtaining the needed funds.

Subdivision (b) instructs clerks to return motions for such funds that are mistakenly filed with the court rather than with the Commission. The clerk has no responsibility for docketing the attempted filing and, in contrast to the provisions of M.R. Civ. P. 5(f) that pertains to filings not in compliance with statutes, rules or orders, the clerk has no obligation to retain a copy of the attempted filing and notice.

15. Rule 69 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 69. ASSIGNED COUNSEL

(a) **Compliance with 15 M.R.S.A. ch. 305-A by Petitioner.** A petitioner who desires to have counsel ~~appointed~~ assigned either before or after final disposition of the petition shall comply with the procedure provided in 15 M.R.S.A. § 2129(1)(B).

(b) **Determination of Indigency; ~~Appointment~~ Assignment and Compensation of Counsel.** The determination of indigency and the ~~appointment~~ assignment and compensation of counsel shall be governed by the provisions of Rules 44 and 44A.

(c) **Continuing Duty of Counsel to Represent Petitioner.** Counsel ~~appointed~~ assigned by the assigned justice before final disposition of the petition shall continue to represent the petitioner on appeal unless relieved by order of the assigned justice or the Law Court.

Advisory Note—July 2010

M.R. Crim. P. 69. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

16. Rule 70 subdivision (c) of the Maine Rules of Criminal Procedure is amended to read as follows:

(1) If the petitioner has been represented by counsel at the time of the filing of the petition or the petitioner does not desire to retain counsel, or, if indigent, to have counsel ~~appointed~~, assigned, the assigned justice shall order the respondent to file a response pursuant to Rule 71 within 20 days of the date the order is received.

(2) If the petitioner has not been represented by counsel at the time of the filing of the petition but expresses an intent to retain counsel forthwith or has made application to have counsel ~~appointed~~ assigned pursuant to Rule 69, the assigned justice shall provide the nonindigent petitioner the opportunity to retain counsel or shall ~~appoint~~ assign counsel for the indigent petitioner. . . .

Advisory Note—July 2010

M.R. Crim. P. 70. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

17. Rule 85 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 85. NATURE OF THE PROCEEDINGS

A petition contesting extradition pursuant to M.R.S.A. § 210 shall be docketed by the clerk on the criminal docket of the District Court or in the unified docket of a court with a unified criminal docket.

Advisory Note—July 2010

This amendment clarifies that petitions contesting extradition can be filed in courts with unified criminal dockets. *See* Administrative Order JB-08-2, *Establishment of the Cumberland County Unified Criminal Docket*, effective January 1, 2009, and Administrative Order JB-10-1, *Establishment of the Bangor Unified Criminal Docket*, effective January 4, 2010.

18. Rule 86 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 86. ASSIGNMENT OF COUNSEL

The determination of indigency, the ~~appointment~~ assignment and compensation of counsel, and the continuing duty of counsel to represent petitioner shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Note—July 2010

M.R. Crim. P. 86. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

19. Rule 96 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 96. ASSIGNMENT OF COUNSEL

(a) **Compliance with 15 M.R.S.A. § 2138(3).** Following the filing of a motion for DNA analysis, the court may ~~appoint~~ assign counsel any time during the proceeding.

(b) **Determination of Indigency; ~~Appointment~~ Assignment and Compensation; Continuing Duty to Represent.** The determination of indigency, the ~~appointment~~ assignment of and compensation of counsel, and the continuing duty of counsel to represent the person shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Note—July 2010

M.R. Crim. P. 96. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

20. Rule 98 subdivision (c) of the Maine Rules of Criminal Procedure is amended to read as follows:

(c) Analysis Results Showing the Person Is Not the Source of the Evidence. If the results of the DNA analysis show that the person is not the source of the evidence, the court shall ~~appoint~~assign counsel if the court finds that the person is indigent under Rule 96(b) and shall hold a hearing as provided under 15 M.R.S. § 2138(10).

Advisory Note—July 2010

M.R. Crim. P. 98(c). *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

21. Rule 106 of the Maine Rules of Criminal Procedure is amended to read as follows:

RULE 106. ASSIGNMENT OF COUNSEL

(a) Compliance with 15 M.R.S. § 2183(2). Following the filing of a post-judgment motion, if the court finds the person to be indigent, the court may ~~appoint~~assign counsel at any time during the proceedings.

(b) Determination of Indigency, ~~Appointment~~ Assignment and Compensation; Continuing Duty to Represent. The determination of indigency, the ~~appointment~~ assignment of and compensation of counsel, and the continuing duty of counsel to represent the person shall be governed by the provisions of Rules 44, 44A and 44B.

Advisory Note—July 2010

M.R. Crim. P. 106. *See* Advisory Note—July 2010 to M.R. Crim. P. 44.

The statute implementing the Maine Commission on Indigent Legal Services explicitly references case types that fall under the Commission's purview, including criminal matters. *See* P.L. 2009, ch. 419 and 4 M.R.S. §§ 1801, 1802(4) and 1804. This amendment clarifies that Rule 44 applies to all cases wherein the court is required or permitted to appoint or assign to represent a party at state expense in proceedings governed by the Criminal Rules.

The amendment changes the reference from appointing counsel to assigning counsel and refers the reader to Rules 44, 44A, and 44B for the specifics about the determination of indigency, the assignment of and compensation of counsel, and the continuing duty of counsel to represent the person.

22. Rule 109 of the Maine Rules of Criminal Procedure is amended to read as follows:

**RULE 109. SUBSEQUENT DISCOVERY OF FRAUD OR
MISREPRESENTATION**

If, subsequent to the granting of the motion, the court holds a hearing to determine fraud or misrepresentation under 15 M.R.S. § 2183(7), the court may, if it finds the existence of material misrepresentation or fraud, issue an order vacating its earlier order certifying a determination of factual innocence and modify accordingly any earlier ordered record correction, as provided under 15 M.R.S. ~~§ 2143(7)~~2183(7).

Advisory Note—July 2010

M.R. Crim. P. 109. The amendment corrects a typographical error.

23. At each place in the Maine Rules of Criminal Procedure at which a statute is referenced by the initials “M.R.S.A.,” and not changed to “M.R.S.” by these specific rules amendments, the statutory reference shall be changed to “M.R.S.”

24. These amendments shall be effective July 1, 2010.

Dated:

FOR THE COURT¹

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR.
Associate Justices

¹ This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.